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# Supreme Court of the United States

**October Term, 1956**

**No. 260**

JOSEPH CURCIO,

*Petitioner;*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PETITIONER

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## BRIEF FOR THE PETITIONER

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### Opinion Below

The opinion of the Court of Appeals is reported at 234 F. (2d) 470.

### Jurisdiction

The judgment of the Court of Appeals was entered on June 5, 1956 (R. 112).

A petition for rehearing was denied by the Court of Appeals on June 22, 1956 (R. 112). The petition for writ

of certiorari was filed on July 18, 1956 and was granted on October 8, 1956 (352 U. S. 820).

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

## Questions Presented

I.

Whether petitioner was properly summarily adjudged in contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, and whether he was denied the right to a hearing and to an adequate and reasonable opportunity to be heard and to introduce evidence in a hearing pursuant to Rule 42(b) that might demonstrate that his answers to questions put to him by the Court in the presence of the Grand Jury would incriminate him.

II.

Whether petitioner could be put in contempt for his failure to answer questions directed to be answered by the Court in the presence of the Grand Jury, so long as it denied to the petitioner a complete transcript of the Grand Jury testimony, for the purpose of demonstrating that the 15 questions chosen as the basis for the contempt proceeding were part of a series of other questions which were obviously incriminatory in nature.

III.

Whether the Court properly overruled the exercise by the petitioner of his privilege under the Fifth Amendment to the Constitution, in view of the implications of the ques-

tions asked the petitioner by the Court in the presence of the Grand Jury and the setting in which these questions were asked.

## Constitutional Provision, Statute and Rule Involved

United States Constitution, Amendment V, provides in pertinent part:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

18 U. S. C. 401 provides in pertinent part:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rule 42, Federal Rules of Criminal Procedure, provides:

> "(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) *Disposition Upon Notice and Hearing.* A criminal contempt, except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts con-

stituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

## Statement

On April 19, 1956, in the United States District Court for the Southern District of New York, District Judge Gregory F. Noonan cited petitioner for contempt of court under the authority of 18 U. S. C. 401 (3), and in accordance with Rule 42(a) of the Federal Rules of Criminal Procedure (*supra*, p. 3).

Petitioner was ordered confined for six months, with the proviso that he could purge himself of the contempt by answering the questions he had been directed to answer (R. 41-43).

This contempt citation grew out of the following circumstances:

On March 29, 1956, a special Grand Jury was impanelled in the Southern District of New York by District Judge Archie O. Dawson to investigate allegations of racketeer-

ing in the garment and trucking industries in New York City (New York Times, March 7, 1956, R. 52).

This investigation followed wide-spread public charges that seven local unions were recently chartered by the International Brotherhood of Teamsters to gain control of the Teamsters Joint Council and that these local unions were controlled by well-known gangsters, ex-convicts and labor racketeers, particularly one John DiGuardi, alias "Johnny Dio" (New York Post, January 25, 1956; New York Times, March 14, 1956; New York Times, March 16, 1956; New York Times, March 23, 1956, R. 51-60).

These same charges were repeated in a civil action commenced in the Southern District of New York by one Martin T. Lacey, President of the Teamsters Joint Council. In fact, District Judge Noonan, who cited petitioner for contempt of court, which is the subject matter of this appeal, granted a temporary restraining order in that civil action. Presumably, therefore, he was fully familiar with the charges made in that civil action (New York Times, March 23, 1956, R. 55).

It also turned out that one of the Assistant United States Attorneys who had questioned the petitioner before the Grand Jury, had conferred with Mr. Lacey in respect to his charges before the petitioner had been subpoenaed to appear before the Grand Jury (New York Times, March 30, 1956, R. 56).

It is also significant that in the examination of the prospective Grand Jurors for the Grand Jury investigation, the United States Attorney asked the jurors whether they were acquainted with John DiGuardi, who was identified

as a labor racketeer and extortionist (New York Times, March 30, 1956, R. 56).

It was in this setting that the petitioner, Joseph Curcio, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, was served with two subpoenas (a personal subpoena and a subpoena duces tecum) for his appearance before the Grand Jury on April 10, 1956, and for the production of certain books and records of the union (R. 47-48). The subpoenas which directed the appearance of the petitioner stated that the petitioner's testimony was to be taken "to testify all and everything which you may know in regard to an alleged violation of Section 371, Title 18 U. S. C., on the part of the United States* * *." Local 269, of which the petitioner was Secretary-Treasurer, was one of the seven local unions alleged to have been chartered for the purpose of controlling the election of the Presidency of the Teamsters Joint Council and the newspapers carried reports that this union was allegedly controlled and run by labor racketeers and gangsters.

The petitioner appeared before the Grand Jury on April 10, 1956 and refused to answer questions on the ground, as he stated at the time, "you are throwing legal stuff here and I don't know whether you are trapping me or not" (R. 65). The petitioner was directed to return again on April 12, 1956.

On April 12, 1956, petitioner appeared before the Grand Jury. He stated he was the Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters (R. 68); that the union had books and records to his knowledge (R. 76); that the books and records of the union were not in his possession (R. 77) either at the time of the service of the subpoena duces tecum (Monday, April 9, 1956) or at

the time of his appearance before the Grand Jury (Thursday, April 12, 1956).

The transcript of the testimony taken before the Grand Jury was not furnished to the petitioner or his attorney until after petitioner was found guilty of contempt. However, the entire transcript of the Grand Jury testimony was printed by the Government and made part of the record on appeal in the Circuit Court of Appeals and as part of the record now before this Court (R. 61-102).

An examination of this transcript, furnished as we have indicated, after the petitioner was found guilty of contempt, indicates that from some of the questions asked the petitioner, there was an implication that petitioner was being charged with a conspiracy with John DiGuardi, identified as an ex-convict and labor racketeer in the public press, to obstruct justice. These questions were (R. 83-84):

> "Q. I believe that you said you were served with two subpoenas between the hours of 3 and 4 this past Monday, is that correct? A. When you say two subpoenas, you mean the card and the paper?
>
> Q. Yes. A. Yes, sir.
>
> Q. Did you get in touch with anyone after you were served with those subpoenas? A. I tried to reach my attorney.
>
> Q. That's not the question I asked you. A. I refuse to answer on the grounds it may tend to incriminate me.
>
> Q. You know John Dioguardia? A. I refuse to answer on the grounds it may tend to incriminate me.
>
> Q. Have you had conversations with John Dioguardia since this past Monday? A. I refuse to

answer on the grounds that it may tend to incriminate me.

Q. Mr. Foreman, I request that the witness be directed to answer that question.

Foreman: The last question?

Mr. Perrotta: The series of questions that I put to him.

Foreman: The series of questions. Will the stenographer read off the series of questions, and I direct the witness to answer the series of questions one at a time and please ask them one at a time.

(Stenographer reads: 'Q. Did you try to get in touch with John Dioguardia after you received those subpoenas?')

Witness: I maintain my privilege.

Mr. Perrotta: Would you read the next question, please?

(Stenographer reads: "Q. You know John Dioguardia?')

Witness: I maintain my privilege.

Q. Did John Dioguardia order you not to come down or, rather, order you not to produce the books and records of Local 269? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Have you seen John Dioguardia since Monday past? A. I refuse to answer on the grounds it may incriminate me.'"

The Assistant United States Attorney, realizing that the petitioner would be justified in refusing to answer these questions, attempted to get the same information by rephrasing his questions and inquiring as to the whereabouts of the books and records at specific times (R. 85-87).

The petitioner, believing that he was being entrapped by the form of these questions, made the following statement which appears at page 85 of the Record:

> "The Witness: They are leading up to something, well, I would like to know what to do."

Obviously, because of this fear, the petitioner refused to answer a number of questions concerning the whereabouts of the books and records of the union on the ground of self-incrimination (R. 86-87).

The petitioner was then excused, with instructions to return on April 17, 1956.

On April 17, 1956, petitioner reappeared before the Grand Jury and declined again, on the ground of self-incrimination, to answer any questions as to the whereabouts of the books and records at specific times (R. 97-99).

The Grand Jury recessed and reconvened later the same day before District Judge Noonan. At these proceedings before Judge Noonan, the Assistant United States Attorney, out of the 225 questions asked the petitioner before the Grand Jury, 15 selected questions as the basis for a contempt proceeding. At this time the Grand Jury stenographer read approximately 15 questions chosen by the Assistant United States Attorney, relating to the whereabouts of the books and records of the union on specific dates, which the petitioner had declined to answer on the ground of self-incrimination (R. 5-10).

Petitioner's counsel asked for and was denied a transcript of the entire Grand Jury testimony (R. 4). The

Assistant United States Attorney stated the Government was not required to turn over a transcript of the testimony (R. 4-5).

When the attorney for the petitioner was asked by Judge Noonan how the answering of these questions would incriminate the petitioner, Mr. Cohen, petitioner's counsel, gave a general explanation of the basis for petitioner's fears. Petitioner's counsel, of course, was unaware of the general nature of the remaining questions asked petitioner before the Grand Jury and he referred generally to the nature of the Grand Jury investigation, as indicated by charges made in the public press and to the civil litigation then pending in the United States District Court and brought by Mr. Lacey (R. 10-11).

Petitioner's counsel represented to the District Judge that the petitioner was asserting his rights under the Fifth Amendment in good conscience because in his mind there was some doubt "as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might commence" (R. 11).

The Court then informed petitioner that his claim of privilege was improperly exercised and directed him to return to the Grand Jury room and answer as many of the questions (which the Grand Jury stenographer read) as the United States Attorney saw fit to re-ask (R. 16).

Later that same day, petitioner was taken before the Grand Jury and declined to answer the 15 questions he had been directed to answer by the Court earlier that day (R. 99-102). He was directed to appear again on April 19th. He was then brought before Judge Noonan again (R. 17).

In the presence of the Grand Jury, Judge Noonan asked him the same 15 questions he had previously been directed to answer (R. 27-28). Petitioner declined to answer on the ground of self-incrimination (R. 27-28).

The Assistant United States Attorney justified the procedure to be followed at this proceeding by explaining that the Grand Jury had not voted a contempt citation, but the purpose of bringing the petitioner before the Court was for the purpose of having the questions put to the petitioner by the Court in the presence of the Grand Jury, at which time and if the petitioner persisted in his refusal to answer the questions, a contempt would be committed in the presence of the Court (R. 19-20).

Petitioner's counsel made a request for a reasonable time to be heard, to prepare a defense to the proceeding (R. 20). He requested again a copy of any testimony before the Grand Jury (R. 20).

The district judge stated that the requests were premature for the proceeding was not actually, as the district judge stated, a contempt proceeding as he originally thought (R. 21). As we stated earlier, the district judge, in the presence of the Grand Jury, directed the petitioner to answer 15 questions which were chosen out of a long series of other questions as the basis for this summary contempt (R. 27, 31). These questions were:

> "Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

Q. Mr. Curcio, have you ever had possession of the books and records of this local?

Q. Did you have custody and control of these records last Thursday?

Q. Do you have possession of those records or any of them today?

Q. Do you have custody and control of any of those records today?

Q. Where are any of those records today, if you know?

Q. Who has any of those records today, if you know?

Q. Where were any of these records or all of these records two weeks ago today?

Q. Where were any or all of these records a week ago yesterday, Monday?

Q. Where were any or all of these records this past Thursday?

Q. Where were any or all of these records a week ago Saturday?

Q. Where are any or all of these records today?

Q. Who, if you know, had any or all of these records a week ago Saturday?

Q. Who had any or all of these records a week ago yesterday?

Q. Who had any or all of these records today?''

The petitioner again refused to answer these questions on the ground, as stated by the petitioner, that the answers might tend to incriminate him (R. 31). The Court reminded petitioner's attorney that they had the burden of establishing that there was a justification for the claim of privilege (R. 29) and in support of this ruling cited the *Trock* case (*United States* v. *Trock*, 232 F. (2d) 839), decided by the Second Circuit Court of Appeals on April 9, 1956. This decision was summarily reversed by this Court on

an application for a writ of certiorari on June 11, 1956, six days after the decision of the Court of Appeals in this case (*Trock* v. *United States*, 351 U. S. 976).

The attorney for the petitioner made another request for reasonable time to prepare a defense and have it supported by witnesses and other documents which would be material and relevant (R. 30). Another request was made for a transcript of the testimony before the Grand Jury (R. 30).

There were repeated requests for a reasonable opportunity to prepare a defense and for a hearing and for a transcript of the testimony before the Grand Jury (R. 30). Finally, the district judge stated that "in a summary proceeding of this fashion, I don't think it is necessary * * * " (R. 31).

Some question arose at this point in the proceedings whether the proceeding then being held before the district judge was a secret or a public proceeding (R. 32). The district court observed there was nothing secret about the proceeding and that any spectator was permitted to come into the courtroom. The district court made the following further observation (R. 32):

> "The Court: The press is here, I see; at least I assume they are members of the press. I think I recognize one. So there is no secrecy about this proceeding."

Again the attorney for the petitioner requested an opportunity to prepare a defense and call witnesses (R. 32).

The attorney for the petitioner insisted that the furnishing of a detailed explanation would amount to the petitioner

testifying against himself (R. 34). The district judge replied (R. 34):

> "The Court: He is probably afraid that he will wake up some morning with his head in a cement block at the bottom of the East River if he talks too much, or at least he has to make some attempt to justify it, if he should talk later and say anything. He has got to make some showing in advance thereof that what he said was minimal and then only because the Court hit him over the head."

Petitioner's attorney pleaded for the opportunity of furnishing an explanation for the petitioner's refusal in the absence of the Grand Jury and in the absence of the Assistant United States Attorneys (R. 35). He stated later that he would furnish the explanation privately to the Court in the presence of the Assistant United States Attorney, but in the absence of the Grand Jury (R. 35). The repeated requests for a hearing of any kind were denied. The district court summarily adjudicated the witness in contempt of court and committed him to the custody of the marshal (R. 35).

The petitioner was sentenced to a six months term with the privilege of purging himself of the contempt at any time by answering the questions.

It was after the petitioner was found guilty of contempt of court that he was furnished for the first time with a complete transcript of the Grand Jury testimony.

An appeal was taken from the order of the district court to the United States Court of Appeals (R. 46). An application for bail was granted on May 7, 1956 (Clark, Chief Judge, Frank, Circuit Judge, concurring, and

Hincks, Circuit Judge, dissenting). The appeal was argued on June 5, 1956 before Circuit Judges Medina, Lumbard and Waterman. The Court of Appeals (opinion by Circuit Judge Medina) could find nothing that justified petitioner's claim of the privilege against self-incrimination in answering questions pertaining to the whereabouts of the books and records of the union. The Court of Appeals held that the petitioner had a fair hearing and was entitled to no further hearing under Rule 42(a) applicable when a contempt is committed in the actual presence of the court (R. 108-109). No error was found in the denial of the transcript of the Grand Jury testimony on April 12, 1956. Judge Medina noted that the petitioner, on the hearing of the claim of privilege, intimated nothing about his testimony before the Grand Jury having a bearing on his refusal to answer questions relating to the whereabouts of the books and records; and, further, that petitioner was in constant consultation with his attorney at the time the requested testimony was given and, therefore, it was reasonable to suppose that his counsel could have directed the district court's attention to any part of the testimony which might have supported the claim of privilege (R. 110).

In the brief filed by the United States, in opposition to the petition for a writ of certiorari, the Solicitor General supported the decision of the Second Circuit for reasons other than those stated by Judge Medina. The Solicitor General contended that the issue before the district judge was solely a question of law; that there were no controlling factual issues of any kind; and, in view of the nature of the issue, which was before the district court for determination, there was no necessity to furnish petitioner with

a copy of the Grand Jury minutes. (Brief for the United States, in opposition to the petition for writ of certiorari, pp. 13-17.)

## Summary of Argument

The procedure adopted in the district court deprived petitioner of the right to a proper hearing and an adequate and reasonable opportunity to be heard and to produce evidence in support of his claim that the questions put to him would tend to incriminate him. The act of the district judge in having a few select questions drawn from the many propounded to petitioner before the Grand Jury, then put by the judge himself to petitioner in open court, with petitioner continuing to refuse to answer these questions, cannot be the basis of a wilful contempt committed by petitioner in the presence of the judge, authorizing invocation of the summary contempt procedure under Rule 42(a), F. R. Cr. P., without the hearing required by Rule 42(b). *Carlson* v. *United States*, 209 F. (2) 209, 214-217 (C. A. 1st); *Wong Gim Ying* v. *United States*, 231 F. (2) 776, 780 (C. A. D. C.). The reliance by the court of appeals on its rule in *United States* v. *Trock*, 232 F. (2) 839, in authorizing and approving the procedure followed in this case is misplaced, especially in light of the summary reversal of that case by this Court. *Trock* v. *United States*, 351 U. S. 976.

The failure of the district judge to order the Government to furnish petitioner with a complete transcript of his testimony and of the many questions put to petitioner before the Grand Jury, to enable petitioner to prepare a

defense to the contempt proceeding, prior to adjudging petitioner summarily in contempt, was error, especially in view of the fact that the complete transcript of petitioner's appearances before the Grand Jury discloses a broad, searching interrogration of petitioner with respect to possible criminal associations. *Hoffman* v. *United States*, 341 U. S. 479; *Trock* v. *United States*, 351 U. S. 976, reversing 232 F. (2) 839 (C. A. 2nd); *Carlson* v. *United States*, 209 F. (2) 209 (C. A. 1st); *United States* v. *Zwillman*, 108 F. (2) 802 (C. A. 2nd).

Petitioner's exercise of his privilege against self-incrimination under the Fifth Amendment to the Constitution was proper, in view of the implications of the questions asked petitioner both before the Grand Jury and by the district judge in open court. To have answered these questions would have resulted in petitioner furnishing "a link in the chain of evidence needed to prosecute (him) for a federal crime." *Hoffman* v. *United States*, 341 U. S. 479, 486. Petitioner's refusal to answer questions as to the whereabouts of the Union books and records was not the assertion of any personal privilege respecting those records, but rather, was an assertion of a personal privilege against self-incrimination directed to all the questions put to him both before the Grand Jury and by the district judge. *United States* v. *Patterson*, 219 F. (2) 659 (C. A. 2nd). The cases of *United States* v. *White*, 322 U. S. 694 and *Rogers* v. *United States*, 340 U. S. 367, are not applicable to the facts of this case.

## ARGUMENT

The entire atmosphere and setting underlying this case, with attendant newspaper publicity, was that of a special Grand Jury investigation into alleged racketeering in the trucking and garment industries in New York City. A special Grand Jury was empaneled during March 1956 for the sole purpose of conducting an inquiry into crime and racketeering aimed at "professional racketeers" and "unscrupulous officers and agents of labor organizations not for the benefit of the union members but for their personal individual gain" (R. 52; New York Times, March 7, 1956 pp. 1 and 28).

As part of this investigation and inquiry petitioner was served with two subpoenas compelling his appearance before this special Grand Jury. One subpoena was a personal one; the other was a subpoena duces tecum requiring the production of union books and records directed at petitioner as secretary-treasurer of Local 269 of the teamsters' union (R. 47-49). Petitioner appeared in response to these subpoenas, and during the course of the examination conducted of him, approximately 225 questions were asked. Many of these questions related to petitioner's association with persons described in the press as "racketeers" (R. 55, 56, 84, 88). Petitioner asserted his privilege against self-incrimination before the Grand Jury, commenting at one point:

> "The Witness: They are leading up to something. Well, I would like to know what to do" (R. 85).

It is also to be observed that there were three assistant United States atttorneys who participated in petitioner's

interrogation, and they took turns putting questions to him. In this setting, in this atmosphere, it is no wonder that petitioner invoked his privilege and sought to maintain it. The entire proceeding was most improper.

Transferring the proceeding to the forum of the district judge merely served to heighten and emphasize the improper character of the proceeding before the Grand Jury. But here the proceeding took on a different character. The district judge put fifteen selected questions to petitioner, questions chosen in isolation from the context of the complete interrogation before the Grand Jury. At this point petitioner sought relief from the court. He requested a transcript of his testimony and the interrogation before the Grand Jury, and time to call witnesses and present evidence that his claim of privilege was made in good faith (R. 20, 21, 30, 32). To these requests the district judge commented:

> "The Court: He is probably afraid that he will wake up some morning with his head in a cement block at the bottom of the East River if he talks too much, or at least he has to make some attempt to justify it, if he should talk later and say anything. He has got to make some showing in advance thereof that what he said was minimal and then only because the Court hit him on the head" (R. 34).

The court thereupon invoked Rule 42(a) of the Federal Rules of Criminal Procedure, holding that petitioner acted contemptuously in the presence of the court and summarily adjudging him in contempt. A six months jail sentence was then imposed against petitioner, with leave to him to purge the contempt by appearing and answering the questions before the Grand Jury (R. 45).

## I.

**Petitioner was deprived of the right to a proper hearing in the district court and an adequate and reasonable opportunity to be heard and to produce evidence to support his claim that the questions put to him would tend to incriminate him.**

The proceeding before the district judge at which petitioner was summarily adjudged in contempt followed a procedure devised by the Government attorneys. When petitioner's counsel in the district court asked that he be advised "of the purpose of this hearing or this proceeding" (R. 19), the Government attorney pointed out that the Grand Jury had not voted a contempt citation "nor is it a contempt proceeding for what has actually occurred up to date" (R. 19). Government counsel then stated: "I request at this time that the questions the witness has refused to answer be put to him again by the Court with a request to the witness asking if he intends to answer the questions, at which time a contempt will be committed in the presence of the Court" (R. 19).

Thus it was that the Government attorneys requested that the Judge himself put to petitioner the questions they had selected from petitioner's over-all testimony for the declared purpose of having petitioner commit a contempt "in the presence of the Court."

Petitioner adhered before the district judge to the privilege he had asserted before the Grand Jury. Petitioner's attorney made a number of requests for a hearing to produce witnesses and documents to establish petitioner's justification for the assertion of his privilege against self-incrimination (R. 20, 21, 30, 32). These requests included

a request to furnish an explanation in private in the absence of the press, spectators and the Grand Jury, but either with or without the presence of the Government attorneys. Petitioner's attorney also made 3 separate requests for a complete transcript of petitioner's testimony before the Grand Jury. Notwithstanding these requests, petitioner was summarily adjudged in contempt pursuant to Rule 42(a) for refusal to answer the selected questions put to him by the District Judge. Counsel's request for a hearing, for the transcript of petitioner's testimony and for time to prepare a defense and call witnesses was denied by the judge who stated that the type of hearing sought by petitioner was not necessary, that "the essential facts are rather self-evident" and that the proceeding then in progress was a "summary proceeding" where the contempt has now been committed, not against the Grand Jury, but against the Court (R. 31). The select questions which the district judge put to petitioner were chosen by the Government attorneys, prepared in the form of an exhibit which was handed to the court (Exhibit 3) and read by the court to petitioner (R. 27).

Petitioner's refusal to answer the select questions was treated as wilful misconduct before the trial judge under Rule 42(a). Petitioner argued that he should have been afforded a hearing at which he could produce witnesses and other evidence to support his claim that his invocation of the privilege against self-incrimination was made in good faith. Circuit Judge Medina, writing the opinion of the Court of Appeals below in this case, replied to this argument stating, "No hearing on this phase of the matter was required or necessary; nor could a hearing have served any useful purpose" (R. 109, 234 F. (2) 470, 473).

This, it was contended followed from the fact that the contempt here was a criminal contempt committed in the actual presence of the court, to be punished summarily as provided in Rule 42(a). It is not disputed that petitioner had no hearing in the district court; he was charged with criminal contempt under a procedure chosen by the Government attorneys and summarily adjudged guilty on this charge.

Judge Medina also pointed out that petitioner gave no indication as to who his proposed witnesses would be or what would be the subject of their testimony if a hearing were granted. The district judge did not refuse petitioner a hearing on this ground; rather the refusal to grant a hearing was grounded in the fact that the procedure adopted by the Government attorneys was devised for the purpose of having petitioner commit his contempt in the actual presence of the court, within Rule 42(a) (R. 19).

Moreover, the district judge in effect "dared" petitioner to give an explanation for his refusal to answer the questions. The district judge speculated that petitioner was afraid to give an explanation for fear he would "wake up some morning with his head in a cement block at the bottom of the East River * * * " (R. 34). This was certainly not an atmosphere which encouraged a complete and detailed explanation by petitioner.

The attempted use of Rule 42(a) in this manner appears to be improper. Rule 42(b), with its safeguards of providing for notice and an opportunity for a hearing on a contempt charge, was specifically provided for by the draftsman of the rules as the proper method of procedure in cases of this kind.

The notes of the Advisory Committee on the adoption of the Federal Rules of Criminal Procedure expressly state that Rule 42(a) is substantially a restatement of existing law, citing *Ex parte Terry*, 128 U. S. 289 and *Cooke* v. *United States*, 267 U. S. 517. This Court has restricted the power to punish for contempt without a jury trial, or other proper hearing, to cases only of actual obstruction. *Cooke* v. *United States*, 267 U. S. 517.

In *Ex parte Terry*, 128 U. S. 289, Terry committed assault on the Marshal who was at the moment removing a heckler from the court room. The "violence and misconduct" of both the heckler and the Marshal's assailant occurerd within the "personal view" of the judge, "under his own eye", and actually interrupted the trial of a cause then under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing, although this conduct may also be punishable as a criminal offense. This Court reached this conclusion since it believed that a court's business could not be properly conducted unless it could suppress outbreaks and disturbances within the court room by immediate punishment.

It is clear, therefore, that Rule 42(a) is intended only to cover contempts amounting to actual misbehaviors which occur, not only in the court's immediate presence, but also within the judge's personal knowledge, acquired by his personal observation of the contemptuous conduct. Knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction for criminal contempt without a trial, and without granting the contemnor opportunity to prepare and pre-

sent a defense. This Court said in the case of *In re Oliver*, 333 U. S. 257, 275 (opinion by Mr. Justice Black):

> Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case (267 U. S. 517) requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception of these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all the essential elements of the misconduct are under the eyes of the court, are actually observed by the court, and where immediate punishmen is essential to prevent "demoralization of the court's authority * * * before the public".

This Court held in the same case that "the right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority'" (333 U. S. 257, 278). Cf. *Sachar* v. *United States*, 343 U. S. 1.

It does not appear to have been the intention of the draftsmen of the rule to permit the summary procedure of Rule 42(a) to be invoked in the case of a witness before a Grand Jury who exercises his privilege against self-incrimination in refusing to answer questions put to him before that body. *Carlson* v. *United States*, 209 F. (2) 209, 214-217 (C. A. 1st). In the *Carlson* case Chief Judge Magruder, writing for the Court of Appeals for the 1st Circuit, discussed the history of the summary contempt

rule, pointing out that the contempt is not complete until a direction by the district judge to the recalcitrant witness is made, with the witness refusing in the presence of the district judge to return to the Grand Jury to answer the questions. However, proper procedure requires that for refusal to answer Grand Jury questions, a witness be given notice before the district judge under Rule 42(b), F. R. Cr. P., of the nature of the proceeding. This notice "shall state the essential facts constituting the criminal contempt charged and describe it as such." Judge Magruder continued:

> If the charge of criminal contempt is that the witness declined to answer the questions upon the pretended ground that the answers would tend to incriminate him, this claim of privilege being advanced in bad faith, then (assuming that such conduct might be deemed misbehavior in the presence of the court within the meaning of 18 U. S. C. §401 (1)), the required notice under Rule 42 (b) would have to describe the alleged misbehavior in order that the witness, in preparing his defense to the charge, may direct his evidence to the issue of his good faith in claiming the privilege (209 F. (2) 209, 216-217).

The cases disclose that the preferred practice is for a written presentment by the Grand Jury to be made seeking to have the witness show cause or otherwise be called upon to answer why he should not be held in contempt for failing or refusing to answer questions put to him before the Grand Jury[1]. The Court of Appeals for the District

1. See, e.g., *United States* v. *Greenberg*, 187 F. (2) 35, 37 (C. A. 3rd) remanded 341 U. S. 944, 192 F. (2) 201, rev'd 343 U. S. 918; *Carlson* v. *United States*, 209 F. (2) 209, 218 (C. A. 1st); *Matusow* v. *United States*, 229 F. (2) 335 (C. A. 5th); *Traub* v. *United States*, 232 F. (2) 43, 46 (C. A. D. C.).

of Columbia Circuit has held that where a district judge arogated to himself the function of putting to the witness some of the questions asked before the Grand Jury, which the witness then refused to answer, the summary contempt adjudged was reversed. *Wong Gim Ying* v. *United States*, 231 F. (2) 776 (C. A. D. C.)[2].

In the instant case the alleged contemptuous conduct was not of such a nature as to come within the category of contempts classified as "disturbing misconduct." While theoretically the offense involved in the instant case is predicated upon the refusal of the petitioner to obey a direction of the district judge to answer certain questions relating to the whereabouts of the books of the local union, an essential element of the offense is a determination of the validity of the district judge's direction in the light of petitioner's rights under the Fifth Amendment. Petitioner's duty to comply with the direction of the district judge depended not upon the mere existence of the court order or direction, but upon the validity of his claim of privilege. A person is not in contempt of court in refusing to answer questions if he rightfully claims his privilege. *Powell* v. *United States*, 226 F. (2) 269 (C. A. D. C.). Whether the petitioner rightfully claimed his privilege would depend upon the determination of a number of questions of fact not within the judge's personal knowledge.

In view of the fact that some essential elements of the offense are not within the personal knowledge of the dis-

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2. At the commencement of the contempt proceeding in this case even the district judge believed a written presentment was necessary to begin the proceeding (See R. 19-20).

trict judge and the district judge must depend upon statements made by others for his knowledge about these essential elements, due process requires that a witness be afforded an opportunity at a hearing to be held for that purpose to come forward with an explanation or evidence in support of the claim that the assertion of the privilege against self-incrimination was made in good faith. The proper rule is described in the cases of *Carlson* v. *United States,* 209 F. (2) 209 (C. A. 1st) and *Wong Gim Ying* v. *United States,* 231 F. (2) 776, 780 (C. A. D. C.). Cf. *Traub* v. *United States,* 232 F. (2) 43, 47-59. These cases clearly demonstrate that the procedure to be followed requires the holding of a hearing and the use of the procedure set forth in Rule 42(b).

The district judge in this case was acting in apparent reliance on the procedure followed in the case of *United States* v. *Trock,* 232 F. (2) 839 (C. A. 2d), when he summarily adjudged petitioner in contempt under Rule 42(a) for wilful misconduct before him. The request made in the district court by petitioner's counsel that the procedure followed in the case of *Carlson* v. *United States,* 209 F. (2) 209 C. A. 1st) be adopted and followed in this case was rejected by the court (R. 21). The Court of Appeals also held that there was no defect in the procedure of this case, stating that it "follows the pattern long in vogue in this circuit" (234 F. (2) 470, 473), citing only the *Trock* decision in that court (232 F. (2) 839). Considering that this Court summarily reversed the *Trock* case (351 U. S. 976), after the decision of the Circuit Court of Appeals in this case it would appear now that this reliance upon the procedure followed there is misplaced. It is to be observed that there was no argument on the merits or

opinion rendered in *Trock*, with this Court's action following the filing of the petition for ceritoriari and the memorandum of the United States in connection therewith only[3].

It has been held that an explanation for the assertion of the privilege under the Fifth Amendment must be given in some more dependable form than the mere statement of counsel as to how the answers will incriminate a witness. *United States* v. *St. Pierre*, 128 F. 2d 979 (C. A. 2d). If it were the duty of the petitioner to furnish this satisfactory explanation, and not simply by argument of counsel, the petitioner was entitled at least as a matter of simple justice to a reasonable opportunity to produce witnesses and documents relevant to the factual issues to be determined. This Court has consistently held that the self incrimination clause of the Fifth Amendment must be liberally construed and not treated as a historical relic to be tolerated. *Hoffman* v. *United States*, 341 U. S. 479; *Quinn* v. *United States*, 349 U. S. 155.

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3. In *United States* v. *Gordon*, 236 F. (2) 916, the Court of Appeals for the Second Circuit reversed a contempt conviction in a case virtually identical with the case at bar. However, in that case, unlike the present one, a hearing was held before the district judge, for which petitioner was allowed an opportunity to prepare his defense. Circuit Judge Frank, writing for the court, held that the summary reversal of *Trock* v. *United States*, 351 U. S. 976, relying solely upon *Hoffman* v. *United States*, 341 U. S. 479, required reversal there. Judge Frank stated that the present case (Curcio) "is distinguishable on its facts," then adding "Besides, that opinion was uttered before the Supreme Court's decision in *Trock*" (236 F. (2) 916, 920). It is submitted that there is no difference at all between these two cases. Circuit Judge Lumbard's concurring opinion in *Gordon* is an attempt to sustain the vitality and validity of the decision of the Court of Appeals in this case, but his statement that the questioning in *Curcio* was limited to the "existence of books and records; their production and their whereabouts is incorrect, in view of the record in this case that the interrogation of petitioner went far beyond these questions.

An opportunity to meet a charge of criminal contempt must be a fair opportunity (Mr. Justice Frankfurter dissenting, *In re Oliver*, 333 U. S. 257, 284). A hearing implies a reasonable opportunity to the accused to introduce evidence relative to the issue. *Hooley* v. *United States*, 209 F. (2nd) 219 (C. A. 1st). The petitioner was denied such an opportunity in this case.

Since a liberal construction in favor of the protection of rights of individuals invariably refers to the procedure to be followed in preserving and implementing these rights, it is clear that any procedure which narrows or detracts from the full and free exercise of these rights ought to be rejected. The substitution of the trial judge as the source of the questions should not authorize or permit the invocation of the summary contempt procedure of Rule 42(a) to cover situations which the rule was not intended to cover. The trial judge becomes the inquisitor rather than the source of the protection of the constitutional rights and guarantees of the individual. This appears to be a new duty or function sanctioned for a federal district judge; and this court, in exercising supervisory jurisdiction in criminal cases over lower federal courts, should disapprove and disavow any such new practice.*

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4. What happens to the usual presumption of innocence and the burden of proof in a summary proceeding under Rule 42(a)? See *Mason* v. *United States*, 244 U. S. 362, 365; *Hoffman* v. *United States*, 341 U. S. 479, 486-487. See also, *Quinn* v. *United States*, 349 U. S. 155, 162, where Chief Justice Warren stated that the respect normally accorded the privilege against self-incrimination in a contempt proceeding would then be buttressed by the presumption of innocence accorded a defendant in a criminal trial. Is this presumption to be eliminated because the Assistant United States Attorney chose to proceed under Rule 42(a) and have the questions put to petitioner by the district judge in open court?

The Solicitor General has taken an entirely different approach to the problem in this case from that of the United States attorney and the Court of Appeals. He states that no hearing was required here, since there was no question of fact to be determined on this record; that petitioner's claim of privilege was directed solely to his status as custodian of union books and records and that as to such status petitioner has no privilege. In this change of position by the Government the fact is overlooked or ignored that petitioner was served with two subpoenas, one personal subpoena and one subpoena *duces tecum* as custodian of records (R. 47-49). This question will be discussed under Point III of this brief.

## II.

**The failure to require the Government to furnish petitioner with a transcript of his appearance before the Grand Jury prior to adjudging him summarily in contempt was error.**

At the commencement of the proceeding before the district judge, petitioner made a request for a transcript of the testimony before the Grand Jury. The Assistant United States Attorney stated that the Government was not required at this point to turn over to the witness a transcript of his testimony before the Grand Jury (R. 4). The district judge agreed with the statement by the Assistant United States Attorney (R. 5). Later in the proceedings, petitioner's counsel again repeated his request on different occasions for a complete transcript of the Grand Jury testimony (R. 20, 30). These requests were denied. It was only after the petitioner was adjudged

guilty of contempt that a complete transcript of petitioner's appearances before the Grand Jury was released and filed "and deemed part of the record on appeal." (R. 103-104).

The Grand Jury testimony was, of course, relevant for it threw considerable light on the purpose and nature of the inquiry and the relationship between the 15 questions selected as the basis for the summary contempt proceeding and the more than 200 other questions.

Neither the district judge nor the petitioner had a copy of the entire interrogation before the Grand Jury and petitioner was not able to demonstrate that his invocation of the privilege against self-incrimination was in good faith. This procedure failed to follow the practice heretofore established in the Second Circuit in the case of *United States* v. *Zwillman*, 108 F. (2) 802, 803, where Judge Augustus N. Hand wrote as follows:

> It is true that the government was not obliged to disclose the testimony before the Grand Jury or to state the purpose of the inquest or whether prosecution of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby deprived him of his right to a proper trial where he could offer evidence in his defense.

Judge Medina calls attention in his opinion in this case to the fact that the *Zwillman* case does not support petitioner's contentions here, since *Zwillman* concerned an alleged contempt before the Grand Jury and not in the presence of the court (R. 109). Zwillman's precise contention was that examination of his complete interrogation before the Grand Jury would disclose that his claim of privilege under the Fifth Amendment was made in good faith. It was for the purpose of making such a showing that Zwillman urged that the government be required to furnish him with a complete transcript of his appearance before the Grand Jury. The Court of Appeals sustained that contention, and its decision in this regard has never been doubted until the present case.

Petitioner's request for a complete copy of the transcript of his appearance before the Grand Jury is identical with the request made in the *Zwillman* case and for precisely the same purpose. It is apparent that the setting in which the court below treated petitioner's argument that he be furnished a complete transcript of his appearance before the Grand Jury was both the fact that the alleged contempt was one committed in the actual presence of the district court and that petitioner's testimony before the Grand Jury was not part of that proceeding. The court treated the questions put to petitioner by the district judge as standing alone, without connection or reference to the Grand Jury interrogation. Judge Medina states in his opinion: "The full record of what occurred has been released and is on file, but is not part of the record before us" (R. 105, 234 F. (2) 470, 472). There is no doubt that the complete transcript of petitioner's appearance before the Grand Jury was physically a part of the Government's

appendix in the Court of Appeals, just as it is part of the transcript of record in this court (R. 61-102). Contrary to Judge Medina's statement in his opinion, the full record of what occurred before the Grand Jury was part of the record before the Court of Appeals, having been made such by the order of Judge Noonan in the district court (R. 103-104).

It has always been understood that proper contempt procedure, in conformance with the requirements of due process of law, required that the contemnor be given every reasonable opportunity to prepare his defense to such proceeding. Minimal requirements of due process would seem to require that for this purpose a witness have made available to him all relevant data and other evidence which may exist to enable him properly to prepare his case. It would seem that following this court's decision in *Hoffman* v. *United States*, 341 U. S. 479, the liberal application of the rules of due process, in harmony with the rights secured under the Fifth Amendment to the Constitution, would be afforded to every witness before a Grand Jury who invokes the privilege against self-incrimination in refusing to answer questions put to him.

It was no fanciful or "mere vague and belated demand" (R. 110, 234 F. (2) 470, 473) which this petitioner asserted in seeking to be furnished with the proof necessary to demonstrate that his invocation of the privilege against self-incrimination was in fact in good faith. The complete transcript, which is part of the record in this court, as it was before the Court of Appeals (although that court declined to consider that it was), clearly demonstrates that the broad searching interrogation of this petitioner was

mainly concerned with his alleged association with criminals and racketeers.

The transcript of petitioner's appearances before the Grand Jury shows that among the questions petitioner was asked were the following:

> Q. You know John Dioguardia? A. I refuse to answer on the grounds it may tend to incriminate me.
>
> Q. Have you had conversations with John Dioguardia since this past Monday? A. I refuse to answer on the grounds that it may tend to incriminate me (R. 83).
>
> * * * * *
>
> Q. Did John Dioguardia order you not to come down, or, rather, order you not to produce the books and records of Local 269? A. I refuse to answer on the grounds it may tend to incriminate me.
>
> Q. Have you seen John Dioguardia since Monday past? A. I refuse to answer on the grounds it may incriminate me.
>
> Q. Do you know John O'Rourke? A. I refuse to answer on the grounds it may tend to incriminate me.
>
> * * * * *
>
> Mr. Perotta: Mr. Foreman, may I request that he be directed to answer whether or not he knows John O'Rourke?
>
> Foreman: You are directed, Mr. Witness, to answer the question, do you know or do you not know John O'Rourke?
>
> Witness: I refuse to answer on the grounds it may tend to incriminate me" (R. 84).

It was shortly after this colloquy that petitioner asserted:

> "Witness: They're leading up to something. Well, I would like to know what to do" (R. 85).

Then the questioning continued, during the course of which petitioner was asked:

> "Q. Mr. Curcio, do you know someone by the name of James Hoffa? A. I refuse to answer on the grounds that it may tend to incriminate me" (R. 88).

Further on, petitioner was asked whether he knew several other persons (R. 94, 95), and as to each such inquiry he asserted his privilege.

The record discloses that Messrs. Hoffa, O'Rourke, Dioguardia and others were alleged racketeers and criminals (R. 56-59). And thus it becomes clear that the purpose of petitioner requesting a complete transcript of his appearance before the Grand Jury was to show that his invocation of the privilege against self-incrimination was made in good faith; that it was the assertion of a personal privilege in response to questions as to his alleged association and relationship with these alleged criminals and racketeers.

In his opinion below, Judge Medina calls attention to the fact that petitioner "was in constant consultation with his counsel during the entire period of his appearance before the Grand Jury on April 12th, and it is reasonable to suppose that counsel would have directed the attention of the court to any part of such interrogation which might be claimed to support the alleged privilege, as was done in the *Zwillman* case. Mere vague and belated demands such as we have in this record are plainly insufficient" (R. 110, 234 F. (2d) 470, 473). Judge Medina's view implies that petitioner remembered approximately 225 questions and that his counsel could have directed the attention of the court to that part of the interrogation which might

be claimed to support the asserted privilege. This would seem to place an intolerable burden on a witness while perverting the constitutional protection against self-incrimination. See *United States* v. *Zwillman*, 108 F. (2d) 802 (C. C. A. 2d).

It is respectfully submitted that petitioner's counsel had no precise knowledge of the questions put to petitioner before the Grand Jury and his ability to point to any particular question at any hearing before the district court was curtailed by such lack of knowledge. Counsel asked for time to prepare to defend the contempt charge, with a copy of the transcript of petitioner's testimony being furnished for the purpose of such preparation. The district judge did not decline to have such transcript furnished for the reason stated by Judge Medina that petitioner was in "constant consultation with his counsel during the entire period of his appearance before the grand jury" and thus was presumed to know what transpired in the Grand Jury room. The district court's decision rested solely on the premise that a contempt was being committed in the presence of the Court authorizing summary disposition under Rule 42(a).

It is apparent that this argument by Judge Medina loses sight of the fact that if the hearing before the district judge was the hearing required under Rule 42(b), that counsel should have been furnished a transcript of petitioner's appearance before the Grand Jury and accorded time to prepare for such hearing. This would have been an adoption of the proper procedure described in the *Carlson* and *Zwillman* cases, and a rejection of the discredited procedure of the *Trock* case. The rights of a per-

son to present an adequate defense should not depend upon the particular procedure selected by the Assistant United States Attorney.

## III.

**Petitioner's claim of privilege against self-incrimination was proper and should have been sustained. It was the exercise of a personal privilege, not as custodian of union books and records.**

Underlying the entire proceeding in the district court is the fact that petitioner's claim that his exercise of the privilege against self-incrimination was the exercise of a personal privilege in response to questions concerning his connection or relationship with alleged racketeers and criminals. The transcript of petitioner's appearances before the Grand Jury clearly discloses that intermingled with questions as to petitioner's knowledge of the whereabouts of union books and records, were a great many questions touching upon his criminal associations and connections. The transcript of record in this case clearly supports this contention (R. 61-102).

Basic to any argument that a particular procedure fails to comport with minimal standards of due process, such as in the conduct of a hearing, or in the type of hearing afforded, and in the furnishing of a litigant with the data and evidence required by him properly to prepare to meet the issues arising in the proceeding, is the requirement that a litigant shall have a proper claim touching the merits of the case.

The record in this case clearly establishes that petitioner's fears or apprehension that the questions put to him before the Grand Jury and the select questions put to him by the district judge were calculated to elicit respon-

sive answers, or an explanation of why these questions could not be answered, which might be dangerous to petitioner, because injurious or incriminatory disclosure would follow.

The setting of the case was such that the petitioner could reasonably have feared that he was not only to be thoroughly investigated, but that he was to be prosecuted. The newspaper clippings, magazine articles and other widely distributed data, all of which are part of the record here and in the Court of Appeals (R. 51-60), containing news releases by the Government's attorneys, disclose that a thorough investigation was in progress before the Grand Jury of seven recently chartered local unions of the International Brotherhood of Teamsters. It was publicly charged that these locals, including the one of which petitioner was secretary-treasurer, were controlled by well known gangsters, ex-convicts and labor racketeers (R. 51-60). The United States Attorney had examined prospective jurors for the Grand Jury as to their knowledge of and acquaintance with John DiGuardia, described as a "labor racketeer convicted of extortion", and allegedly president of Local 269, of which petitioner was secretary-treasurer (R. 56).[5]

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5. The newspaper clippings which appear on pages 51-60 of this record were printed as part of the Appendix to Petitioner's Brief in the Circuit Court of Appeals. See *Hoffman* v. *United States*, 341 U. S. 479. They were not before the district judge, although they would have been submitted if an opportunity had been given to the petitioner to present such evidence at a hearing. The alleged association between the petitioner and John Diguardi was enough to furnish sufficient weight and credibility to the suggested connecting chain of incriminating evidence justifying the petitioner in exercising his privilege. *United States* v. *Coffey*, 198 F. (2d) 438, 440 (C. A. 3rd). It has been held that a court can take judicial notice of these background facts. *United States* v. *Costello*, 222 F. (2d) 656, 661 (C. A. 2nd).

In view of the above general background, the petitioner certainly could reasonably have sensed the peril of prosecution for a wide variety of federal offenses, including the Anti-Racketeering Act, the act prohibiting conspiracies to violate the laws of the United States, and conspiracies to obstruct justice.

We know that in a war an artillery barrage would precede an attack by an army. The opposing army by reason of this barrage would have good reason to believe it was about to be attacked. Certainly with this barrage of publicity (R. 51-60) which preceded the investigation by the Government and the service of the subpoenas in this case, this petitioner had good grounds for fear that he was going to be attacked personally or at least be the subject of a "hunt" for violations of the criminal laws of the United States.

The subpoenas served upon petitioner called for personal testimony, not merely testimony as a custodian of books and records (R. 47-49). The numerous questions asked of petitioner included many questions touching his relationship with these criminal persons and his exercise of his privilege as to all questions was grounded in a fear that the Government was "leading up to something" (R. 85). The Solicitor General contends that the questions put to petitioner were put to him only in his representative capacity as the normal custodian of the union's books and not as an individual. The record in this case discloses that this is not so.

The interrogation of petitioner as to his alleged association with criminals and racketeers (R. 84, 88) would seem to be grounded in some knowledge on the part of the Gov-

ernment that he was in fact associated with these persons, or it was part of a search for evidence leading to an inference that such was the case. If petitioner were allegedly associated with criminals or if his interrogation was designed to compel him to furnish evidence of such association, then it is clear that his invocation of the privilege against self-incrimination was proper.

On the merits, this case turns on this Court's decision in *Hoffman* v. *United States*, 341 U. S. 479. See, also, *United States* v. *Doto*, 205 F. (2d) 416 (C. A. 2nd); *United States* v. *Weisman*, 111 F. (2d) 260 (C. A. 2nd); *United States* v. *Zwillman*, 108 F. (2d) 802 (C. A. 2nd); *United States* v. *Cusson*, 132 F. (2d) 413 (C. A. 2nd).[6]

It is no answer to say that the 15 questions chosen as the basis for a contempt conviction relate only to the whereabouts of the union books and records. These 15 questions were part of a series of approximately 225 questions. It would certainly be a new approach to avoid the effect of this Court's decision in the *Hoffman* case by permitting the Government not only to choose the type of procedure but to select and isolate certain questions out of context of a series of questions. Can an Assistant United States Attorney justify a contempt proceeding by the expert use of scissors and choose questions which look harmless on their face when separated from other questions, which are obviously incriminatory in nature?[7]

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6. See this Court's action in *Greenberg* v. *United States*, 343 U. S. 918; *Singleton* v. *United States*, 343 U. S. 944.

7. Wolfram, *Peril, Pursuit and the Privilege against Self-incrimination: The Problem of the Apparently Innocuous Questions*, 5 Syracuse Law Review 127 (1954).

To label the questions put before petitioner by the district judge as "auxiliary questions relating to the location and production of such records" is an over-simplification of a constitutional question. Petitioner was not required to stand by and let his interrogators "pick out one, and say, if that be put, the answer will not incriminate him" (*Foot* v. *Buchanan*, 113 Fed. 156, 161; *United States* v. *Rosen*, 174 F. (2d) 187; *Poretto* v. *United States*, 196 F. (2d) 392, 396; *People* v. *Newmark*, 312 Ill. 625).

The Solicitor General takes the position in this case that the constitutional and legal questions involved may be considered in a sort of isolation booth completely oblivious to the nature of the Grand Jury investigation and the totality of the questions asked the petitioner. The Government relies upon this Court's decision in *United States* v. *White*, 322 U. S. 694, as the source of its argument that petitioner, as custodian of union books and records, had no privilege in relation to them. Petitioner asserted no privilege as custodian of union books and records; and he having testified at the outset of his interrogation before the Grand Jury that he did not have these books and records, the *White* case is not applicable.[8]

Nor may the select questions be treated as "auxiliary questions" touching upon petitioner's knowledge of the whereabouts of the union books and records, since this interrogation would necessarily involve petitioner disclosing the extent of his relationship with persons claimed by the Government to be racketeers and criminals. Petitioner would then be open to a charge of having conspired with

8. The case of *Rogers* v. *United States*, 340 U. S. 367, is not in point since the sole question before the Court there was that petitioner's waiver of the privilege against self-incrimination.

these criminals and racketeers to obstruct justice. *Bosselman* v. *United States,* 239 Fed. 82 (C. A. 2nd); *Heinze* v. *United States,* 181 Fed. 322 (C. A. 2nd). See *United States* v. *Patterson,* 219 F. (2d) 659, 661 (C. A. 2nd), where the Court of Appeals pointed out that the district judge sustained the privilege of a witness to refuse to answer as to the whereabouts of certain books and records on the ground that testimony as to the destruction of books and records might lead to his prosecution for violation of Section 145(b) of the Internal Revenue Code and evasion of the tax laws. See also, the very recent decision in *Bradley* v. *O'Hare,* 2 App. Div. 2nd 436, where a New York court held a witness was privileged for refusing to answer questions as to the whereabouts of union books and records.

In the case of *United States* v. *Austin-Bagley Corp.,* 31 F. (2d) 229 (C. A. 2nd), certiorari denied, 279 U. S. 863, the question involved was the compulsion of corporate officers to produce and identify on a criminal trial corporate books and records which contained evidence against said officers. The Court of Appeals held that these defendants had no privilege in said books and records, and "that testimony auxiliary to the production (of said records) is as unprivileged as are the documents themselves" (31 F. (2d) 229, 234). This is certainly a different situation from testimony as to possible criminal associations and connections which may be determined from exploratory questions touching petitioner's knowledge of the whereabouts of union books and records.

Judge Medina's comment that counsel seems to suppose "that notorious criminals, racketeers and unsavory char-

acter generally have an open sesame to the privilege guaranteed by the Fifth Amendment" (234 F. (2d) 470, 474) is not a proper comment. Counsel supposes nothing of the sort. The rulings of this Court and other courts require that any assertion in good faith of the privilege against self-incrimination, whether by an alleged criminal, communist, conscientious objector or any other person, is to be respected and is not to be deprecated, impugned, narrowed or struck down.

The order adjudging petitioner Joseph Curcio guilty of contempt should be reversed and judgment of acquittal be ordered entered. *Bryan* v. *United States*, 338 U. S. 552, Rule 29, F. R. Cr. P.

## CONCLUSION

**It is, therefore, respectfully submitted that the judgment of the court below should be reversed and that judgment of acquittal be entered.**

Respectfully submitted,

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